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DEC 17 2007

BEFORE A HEARING OFFICER
OF THE ARIZONA SUPREME COURT

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *CSH*

IN THE MATTER OF A MEMBER

No.06-0776

MARK N. GOODMAN
Bar # 005124

HEARING OFFICER REPORT
AND RECOMMENDATIONS

Respondent

(Hearing Officer 7N)

PROCEDURAL HISTORY

Complaint was filed by the State Bar of Arizona on May 2, 2007 alleging one count.

Respondent filed an Answer on May 19, 2007 and an amended Answer on August 3, 2007.

Respondent filed a Motion for Summary Judgment with regard to the attorney-client relationship on May 19, 2007, which was granted on stipulation by the State Bar on July 2, 2007 - ruling that there was no attorney-client relationship between Respondent and Anthony Costantino at the time of the actions complained of herein.

Respondent filed Motions for Summary Judgment with regard to ERs 1.4, 1.9 and 8.4(c) on June 8, 2007.

Notice of Intent to Use Prior Discipline and Motion for Protective Order Sealing the Record [with regard to prior discipline] were filed by the State Bar on June 11, 2007.

Telephonic Case Management Conference was held on June 28, 2007. The Motion to Seal the File was granted. The Motion for Summary Judgment with regard to ER 1.4 was also granted on

1 stipulation by the State Bar - ruling there was no ER 1.4 duty to
2 Mr. Costantino because he was not a current client at the time of
3 the actions complained of herein. The formal order was signed
4 on July 2, 2007.

5 Respondent filed a Motion for Summary Judgment with regard
6 to ER 8.4(d) as well as a Motion to Dismiss Complaint and Vacate
7 Probable Cause Order, on July 2, 2007.

8 Respondent filed a Motion for Due Process Relief on July 6,
9 2007.

10 State Bar filed a Motion to Preclude Respondent from Calling
11 Bar Counsel as a Witness on July 6, 2007. On July 13, 2007
12 Respondent "waived" calling Bar counsel which mooted the Motion.

13 A telephonic oral argument with regard to the pending
14 Motions was held on August 2, 2007

15 The Motions for Summary Judgment with regard to ER 1.9,
16 8.4(c) and 8.4(d), and the Motions for Due Process Relief and to
17 Dismiss Complaint were denied on August 6, 2007.

18 A hearing on the merits was conducted on August 30, 2007.

19 Post Hearing Memoranda were filed on October 15 and 16,
20 2007.

21 The Bar alleges that Respondent violated Rule 42,
22 Ariz.R.Sup.Ct ER 1.9(a); 1.9(a); 8.4(c); 8.4(d) which state:
23 ER 1.9 Duties to Former Clients

24 (a) A lawyer who has formerly represented a client in a matter
25 shall not thereafter represent another person in the same or
26 a substantially related matter in which that person's

1 interests are materially adverse to the interests of the
2 former client unless the former client gives informed
3 consent, confirmed in writing.

4 . . .

5 (c) A lawyer who has formerly represented a client in a matter
6 shall not thereafter:

7 (1) use information relating to the representation to the
8 disadvantage of the former client except as these Rules
9 would permit or require with respect to a client, or when
10 the information has become generally known; or

11 (2) reveal information relating to the representation except
12 as these Rules would permit or require with respect to a
13 client.

14 ER 8.4 Misconduct

15 It is professional misconduct for a lawyer to:

16 . . .

17 (c) engage in conduct involving dishonesty, fraud, deceit or
18 misrepresentation;

19 (d) engage in conduct that is prejudicial to the
20 administration of justice.

21 . . .

22 This Hearing Officer finds, by clear and convincing
23 evidence, concludes and recommends as follows:

24 **FINDINGS OF FACT**

25 1. At all relevant times herein, Respondent was licensed to
26 practice law in the State of Arizona, having first been
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- 1 admitted to practice on October 8, 1977.
- 2 2. Respondent represented Anthony Costantino [hereafter
3 Costantino] and his entity Executive Industries [hereafter
4 EI] between November 6, 1995 and July, 2003. [TR 54:15-21;
5 SB Exb 6; R Exb. C; Amended Answer para.2]
- 6 3. In 1999, EI, while represented by Respondent, sued the
7 Boltons for damages related to a copier. A judgment
8 [hereafter Bolton Judgment] was obtained on March 31, 1999
9 against the Boltons in favor of EI in the amount of \$33,844¹
10 plus interest. [R Exb. A] That judgment was assigned by EI
11 to Costantino. [SB Exb. 6]
- 12 4. The Bolton Judgment was recorded against the Bolton's real
13 property. [R. Exb. A]
- 14 5. On August 16, 2000 Costantino signed a promissory note to
15 Respondent in the amount of \$25,000.00 plus interest for
16 unpaid fees and costs. [TR 58:9-18; SB Exb. 6]
- 17 6. On May 19, 2004 Respondent wrote Costantino formally
18 terminating his representation of him and EI. [SB Exb. 6]
- 19 7. Respondent assigned Costantino's promissory note to Celeris,
20 "an LLC that receives bad debt from a professional
21 corporation" and which is wholly owned by Respondent's
22 professional corporation and his family. [TR 114:18 - 115:5]
- 23 8. Costantino made some payments on the promissory note but a
24

25 ¹ The judgment ordered \$12,300.00 for general/compensatory damages with
26 interest at 10% from 1-28-97; \$6,544.00 with interest at 10% from 3-31-99
27 consequential damages; \$5,000.00 with interest at 10% from 3-31-99 for
punitive damages; and \$10,000 with interest at 10% from 3-31-99 for attorney's
fees.

1 significant amount was still due and owing in 2005 when
2 Celeris filed suit against Costantino for the unpaid balance.
3 A default judgment was obtained by Celeris against Costantino
4 on November 30, 2005 in the amount of \$25,246.60 plus
5 interest [hereafter the Costantino Judgment]. [SB Exb. 6; R
6 Exb. D] Costantino never made any payment on the Judgment.

7 9. At all relevant times thereafter, Costantino was an ex-client
8 of Respondent, and an adverse party and judgment debtor to
9 Celeris.

10 10. On or about December 29, 2005 Respondent's firm received a
11 fax from First American Title inquiring as to the payoff
12 amount on the Bolton judgment. At that time, Respondent
13 believed he was the assignee/owner of the Bolton Judgment.
14 [TR 132:8-13] The fax was returned to First Financial by
15 Respondent's office with the note "payoff amount = \$59,397.04
16 as of 1/1/2006 will accept less if paid by 1/31/2006". [R
17 Exb. E]

18 11. Respondent's action in returning the fax without checking to
19 see whether he was in fact the owner of the Judgment was
20 negligent.

21 12. In late January 2006 Aaron Rogers, a loan office manager at
22 First Finance, called Respondent's law office on behalf of
23 the Boltons, who wanted to refinance a property loan. He
24 spoke initially with a secretary and eventually with
25 Respondent. [TR 23:12-16; 37:6-10; 43:11-19; 46:1-9].
26 Respondent does not recall speaking directly with Mr. Rogers
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1 until April 10, 2006. [TR 116:9-14].

2 13. From February 1 thru 11, 2006 Respondent was ill. He was out
3 of his office most of this time. [TR 143-144; R Exb. I]

4 14. During the first week of February, 2006 Rogers communicated
5 with Respondent's office regarding possible settlement of the
6 Bolton Judgment.

7 15. On February 6, 2006 Rogers conveyed an offer to Respondent's
8 office of \$18,000.00 to settle the Bolton Judgment. [TR
9 25:14-23; SB Exb. 6]

10 16. On February 7, 2006 Respondent's office sent a letter to
11 Rogers, which Respondent probably reviewed, confirming terms
12 of a proposed settlement of the Bolton Judgment and referring
13 to Costantino as "client". [TR 117:21-23; SB Exb. 6] [TR27:2-
14 21; SB Exb. 6]

15 17. Respondent's action in using the term "client" in this letter
16 was negligent.

17 18. Respondent had not communicated with Costantino regarding the
18 Bolton Judgment before this letter was sent.

19 19. Respondent's action in communicating with Rogers without
20 first communicating with Costantino was knowing and
21 intentional.

22 20. On February 8, 2006 Respondent contacted Costantino for the
23 first time, via e-mail, advising him of the Bolton's desire
24 to settle the judgment, and stating he [Respondent] would
25 "...take their offer of \$18,000.00 to release the judgment
26 and then apply it to your debt to us" if Costantino approves.
27

1 Costantino replied on the same day that he would "say yes" if
2 Respondent would accept that amount "...as payment in full
3 for my complete debt" to Respondent. Still on February 8th,
4 Respondent replied that he would give Costantino a \$25,000.00
5 credit for the \$18,000.00 payment. On the same day,
6 Costantino replied "My answer is no". Four more e-mails were
7 exchanged between Respondent and Costantino on February 8th
8 wherein Respondent urged Costantino to take the offer. The
9 final e-mail from Costantino to Respondent stated: "I offered
10 the gift to you, and you rejected it. Have them call me
11 directly or send the check to me. I am broke and could use
12 \$18,000.00". [SB Exb. 6; R Exb. B]]

13 21. Any reasonable person would interpret the last e-mail from
14 Costantino to Respondent on February 8, 2006 to mean that
15 Costantino did not want or expect Respondent to continue to
16 negotiate on Costantino's behalf. That was, in fact, what
17 Costantino intended it to mean. [TR 69:5-10]

18 22. On February 10, 2006 another letter was sent to Rogers over
19 Respondent's signature indicating that the \$18,000.00 offer
20 had not been accepted and making an offer to settle the
21 Bolton Judgment for \$25,000.00. [SB Exb. 6]

22 23. Respondent did not contact Costantino between receiving the
23 February 8th e-mails set out in Finding 20, *supra*, and sending
24 the February 10th letter set out in Finding 22, *supra*. [TR
25 118:15-18; TR 124:7-17]

26 24. Respondent's action in making a \$25,000.00 counter-offer to
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1 Rogers without Costantino's approval was knowing and
2 intentional.

3 25. Respondent made the offer of \$25,000.00 at least in part
4 because Respondent was willing to accept that amount in full
5 payment of Costantino's debt to him. [TR 120:3-5]

6 26. Respondent filed an Application for Writ of Garnishment
7 against Cosantino on February 10, 2006. [TR 122: 15- TR 123:
8 20] Costantino was served with the Writ on February 14, 2006.
9 The Writ requires the garnishee (Costantino) to answer within
10 10 days of service whether the Garnishee holds any property
11 of the Judgment Debtor (Costantino) and states: "FROM AND
12 AFTER SERVICE OF THE WRIT OF GARNISHMENT, Garnishee shall not
13 pay to the Judgment Debtor any debt which is not exempt....".
14 The Instructions served with the Writ also state that the
15 Garnishee "shall not pay the Judgment Debtor any monies or
16 deliver any personal property which is not exempt...". [SB
17 Exb 7]

18 27. Costantino believed that the garnishment related to his
19 wages. [TR 76:11-15]

20 28. Although the Writ did not specifically mention the Bolton
21 Judgment, it clearly related to all assets in the possession
22 of the Garnishee for the Judgment Debtor.

23 29. Respondent sent an e-mail to Costantino on February 13th,
24 indicating that Respondent was "still working on a way to
25 resolve this". The \$25,000.00 offer on February 10th was not
26 mentioned in the February 13th e-mail. [SB Exb. 6; R Exb. B]

1 30. Costantino replied to Respondent via e-mail on February 14th,
2 again referring to the \$18,000.00 amount and stating: "If you
3 do not wish to accept this, I will have my current attorney
4 contact you to discuss the negotiations with the woman you
5 should not be speaking to on my behalf without my approval."

6 [SB Exb. 6; R Exb. B] (emphasis added)

7 31. Respondent replied to Costantino on February 14, 2006 - again
8 without mentioning his \$25,000.00 offer of February 10th -
9 stating: "I am still working on this", attaching two release
10 forms and requesting Costantino to sign and return them. The
11 release forms do not mention the settlement amount.
12 Respondent further stated: You will receive a garnishment as
13 part of this process. Let me know when you receive the
14 garnishment. ... The Debtor's agent is waiting to receive a
15 letter from me accepting their offer. ... Once I have the
16 money from the Debtor, I will give you a signed full release.
17 If you don't want me working on a way to get some money out
18 of the Debtor and get you a full release of liability, then
19 have your lawyer contact me. Let me know if you intend to
20 cooperate." [SB Exb. 6; R Exb. B]

21 32. The reference to an "offer by the Debtor's agent", and the
22 "Debtor's agent waiting for a letter accepting that offer",
23 are inaccurate. The garnishment was not a necessary part of
24 the settlement process except to the extent that Respondent
25 wanted control of the Bolton Judgment for himself.

26 33. Costantino replied on February 14th, still under the impression
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1 that the settlement offer was for \$18,000.00, stating: "No,
2 if the \$18,000.00 does not make the debt between us paid in
3 full then I will not accept. Please instruct all parties
4 requesting my release to contact Joel Hoffman at Hoffman &
5 Bergstrom. 602-253-3085. As for the garnishment, take a
6 number. ... the choice is now yours. Accept the \$18,000.00
7 as payment in full or send me a garnishment.". This e-mail
8 also refers to Costantino's concern that Respondent had
9 "taken advantage of him in the past" through Respondent's
10 billing practices. [SB Exb. 6; R Exb. B]

11 34. At no point did Respondent tell Costantino that he was
12 negotiating for a \$25,000.00 settlement with the Bolton's
13 agent. [TR 84: 3-6; 125 2-6]

14 35. Respondent's action in not informing Costantino that
15 Respondent was negotiating for \$25,000.00 was knowing and
16 intentional.

17 36. At no point did Respondent inform Costantino that he could
18 receive the settlement funds directly.

19 37. At no point did Respondent notify Costantino of the name of
20 Bolton's agent or how to reach him.

21 38. Costantino could have used the information regarding the
22 availability of Bolton funds and the identity of their agent
23 to negotiate a settlement whereby the funds (in whatever
24 amount) went directly to Costantino.

25 39. On February 14th Costantino again wrote Respondent stating he
26 had been served with the garnishment papers, advising that he
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1 could not print the release papers to sign and asking "Please
2 advise, am I signing the settlement document mutually ending
3 the matter or turning in the garnishment papers?". [SB Exb.
4 6; R Exb. B]

5 40. Minutes later on February 14th Costantino again wrote
6 Respondent stating: "I am also confused as to the
7 relationship between Goodman Law firm and Celeris Services
8 company. The agreement needs to release me from both debts
9 if they are not one in the same".

10 41. Respondent replied, on February 15th, referring to
11 Costantino's "threats and insults" and stating, *inter alia*,
12 "...if Mr. Hoffman represents you I am not going to
13 communicate with you about the matters until and unless he
14 gives me written permission to do so. ... if Hoffman
15 represents you, he should contact me. ... if Mr. Hoffman does
16 not represent you, I will decide whether to release you
17 depending upon the tone of your communication." Respondent
18 did not answer Costantino's questions of the prior two e-
19 mails. [SB Exb. 6; R Exb. B]

20 42. Costantino replied on February 15th: "If you are unable to
21 simply answer my question then I will have someone contact
22 you.

23 43. Respondent did not answer Costantino's questions because "he
24 (Costantino) raised the fee dispute and ... he was telling me
25 that he had a lawyer... and so I couldn't answer his
26 questions." [TR 129: 1-12]

1 44. As of February 15th, Respondent's communication with
2 Costantino would have been interpreted by any reasonable
3 person to mean that Respondent was no longer attempting to
4 negotiate a settlement with the Boltons on Costantino's
5 behalf.

6 45. As of February 15, 2007, Costantino's communication with
7 Respondent would have been interpreted by any reasonable
8 person to mean that Costantino no longer expected or wanted
9 Respondent to negotiate on his behalf.

10 46. There was no communication between Respondent and Costantino
11 between February 15, 2006 and the date of the hearing in this
12 matter. [TR 97: 21-24]

13 47. Costantino never requested nor authorized Respondent to
14 negotiate settlement of the Bolton Judgment on his behalf.
15 [TR72:25 - 73:4]

16 48. Neither Respondent nor his staff ever told Rogers that
17 Costantino was not his client; nor did Respondent ever give
18 Rogers information regarding contacting Costantino directly.
19 [TR 30:24 - 31:6; TR 45:2-14]

20 49. Neither the possibility of a fee dispute, the possibility of
21 Costantino having other counsel, or anything else presented
22 to this Hearing Officer would have reasonably prevented
23 Respondent from notifying Costantino of Rogers' status, name,
24 address and phone number or of notifying Rogers of
25 Costantino's status, name, address and phone number.

26 50. Until he was contacted directly by Costantino, Rogers
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1 believed that Respondent was negotiating on behalf of
2 Respondent's client. [TR 30:15-19]

3 51. Costantino had significant experience in business, and with
4 the use of attorneys in a business setting. [TR 55: 12-19;

5 52. Costantino did not respond to the Writ of Garnishment, nor
6 did he consult counsel regarding it's implications. Instead
7 he "turned the garnishment papers over to the administrative
8 department at my company". [TR 81:13-14]

9 53. A Garnishment Order was filed on March 22, 2006. Ordering
10 Costantino to hold the Bolton Judgment pending service of a
11 Writ of Special Execution. [SB Exb. 6; R Exb. F] A Writ of
12 Special Execution issued on April 3, 2006 against the Bolton
13 Judgment. [SB 7; R Exb. G] Sheriff's Levy issued on April 7,
14 2006 [SB 7; R Exb. H]. Notice of Sheriff's Sale of the
15 Bolton Judgment was dated April 18, 2007. The sale occurred
16 on May 4, 2006 and the Judgment was sold to Celeris. [TR
17 137-140]

18 54. Costantino received the Writ of Special Execution prior to
19 the Sheriff's Sale. [TR 82: 15 - 83: 15] Costantino could
20 have attended the Sheriff's sale but elected not to do so.
21 [TR 110:8-13]

22 55. On March 29, 2006 Respondent sent a letter to Rogers (and
23 others) accepting their offer of \$25,000.00 in full
24 satisfaction of the Bolton Judgment. The letter stated: "The
25 Bolton judgment was assigned and the assignee's interest in
26 the judgment was garnished; the garnishor has accepted your
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offer." [SB Exb. 6; R Exb. F]

56. On March 29, 2006, although the Garnishment Order had been entered, the Writ of Execution on the Judgment had not issued nor was Celeris the owner of the Judgment. [See Finding 35, *supra*.]

57. Respondent and Rogers had a telephone conversation on April 10, 2006. Rogers had called Respondent because Rogers had received a phone call from Costantino "upset, screaming and yelling" at Rogers, and Rogers wanted reassurance that the matter would close. During that conversation, Rogers told Respondent about Costantino's call to Roger's office. Respondent assured Rogers that the matter would close.

58. Following that phone call, also on April 10, 2006, Respondent sent a letter to Rogers stating: "...the Bolton judgment was garnished and is being levied upon. ... A writ of Special Execution has been issued and is in the hands of the Maricopa County Sheriff for levy/service. [SB Exb. 6; R Exb. F]

59. The Bolton Judgment was ultimately released for payment of \$25,000.00. [SB Exb. 6]

60. The ultimate settlement amount of \$25,000.00 was first suggested by Respondent, not by Rogers.

61. On May 8, 2006 Respondent filed a partial Satisfaction of Judgment, in the amount of \$25,000.00 in the Costantino Judgment. [SB Exb. 7]

62. Costantino knew at all relevant times herein that the Boltons lived in Maricopa County. He neither searched a telephone

1 directory nor an Internet service for them. [TR 101: 9-20]

2 63. Costantino first contacted the Boltons shortly prior to
3 receiving the Writ of Special Execution (issued April 3,
4 2006). During his conversation, he informed Mr. Bolton that
5 Respondent did not represent him, and asked Mr. Bolton to
6 have his agent contact him directly. [TR 105:5 - TR 106:25].
7 He then spoke with the agent (Rogers), discussed the
8 negotiation history, and also asked to be contacted directly.
9 [TR 105:14; TR 107:20 - TR 108:12]

10 64. Costantino spoke to Bolton again on May 2, 2006 and to Rogers
11 soon thereafter, only to learn that the "loan had been
12 cleared up weeks ago". [TR 80:24-25; SB Exb. 7]

13 65. On May 8, 2006 Respondent caused a partial Satisfaction of
14 Judgment, in the amount of \$25,000.00 to be filed in the
15 Costantino Judgment. [SB Exb. 6]

16 66. Costantino filed a Bar complaint on May 11, 2006. [SB Exb. 7]
17 Although the Complaint does contain one paragraph which
18 refers to what Costantino believes may have been excess fees,
19 it is not a "fee dispute" and the gravamen of the complaint
20 relates to Respondent's dealings with the Bolton Judgment.

21 67. On November 27, 2006 - after Costantino had filed the Bar
22 complaint, and after the Probable Cause Order issued -
23 Respondent caused to be filed a Full Satisfaction of Judgment
24 with regard to the Costantino Judgment. [TR 103:15-23; SB
25 Exb. 2] A copy of the Satisfaction was provided to
26 Costantino.

1 68. Respondent is a respected member of the Bar in Yavapai County
2 and the State of Arizona. He has volunteered for numerous
3 community, professional and charitable organizations and his
4 services have been much appreciated by the recipients. [R.
5 Exb. J]

6 69. Respondent has received one prior disciplinary action, Comm.
7 No. 88-0913, an Informal Reprimand in February 1992 based on
8 an action in 1988 which bore no similarity to the issues
9 raised herein. [SB Exb. 8-9]

10 **CONCLUSIONS OF LAW**

11 1. Respondent had no authority to negotiate a settlement of the
12 Bolton Judgment until at least March 22, 2006 when the
13 Garnishment Order was filed.

14 2. From at least February 7, 2006, Respondent knew or should
15 have known that he was not the owner of the Bolton Judgment.

16 3. Between at least February 7 and March 21, 2006 Respondent
17 dealt with Rogers, the Bolton's agent, as though he did have
18 authority to negotiate a settlement on behalf of a client who
19 owned the Bolton Judgment.

20 4. Respondent's contacts with Rogers were calculated to cause
21 the agent to believe that Respondent was acting on behalf of
22 a client who owned the Bolton Judgment, and that Respondent
23 had the authority to do so.

24 5. Respondent was acting on his own behalf from at least
25 February 7, 2006 to the conclusion of this matter to achieve
26 payment of monies owed to him by Costantino.

1 6. Respondent took action to achieve ownership of the Bolton
2 Judgment based on knowledge he had obtained from Rogers under
3 circumstances in which Respondent knew or should have known
4 that Rogers was sharing that information only because Rogers
5 believed Respondent was representing the owner of the
6 Judgment. Respondent used that knowledge to further his own
7 interest in receiving payment for the judgment he had against
8 Costantino.

9 7. Respondent knowingly did not inform Rogers that Costantino, a
10 former client, had specifically asked Respondent to tell
11 Rogers to contact him (Costantino) directly.

12 8. The only party Respondent represented during his negotiations
13 with Rogers and/or the Boltons was himself and his
14 corporation Celeris. There is no significant distinction
15 between the two.

16 9. There is no restitution owed to Costantino because he
17 ultimately received a complete Satisfaction of Judgment.
18 This Hearing Officer finds by clear and convincing evidence
19 that Respondent violated ER 1.9(c) and 8.4(c)

20 **ANALYSIS**

21 Respondent owed duties in this matter to a former client
22 (Costantino), to a non-client (Boltons and their agent Rogers) and
23 to the legal profession. Respondent did not use information which
24 he had obtained during the representation of Costantino to
25 Costantino's disadvantage. What Respondent did do, was to obtain
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1 information which operated to Respondent's² advantage based by
2 nurturing, if not creating, the false impression that Costantino
3 was his current client, while depriving Costantino of the ability
4 to use that same information to Costantino's own advantage.

5 Costantino could certainly have been more pro-active in
6 locating the Boltons on his own and intervening in the negotiation
7 with Rogers - thus blocking Respondent's ability to obtain and
8 conscript the Bolton Judgment asset. Costantino could also have
9 sought legal advice regarding the garnishment and learned that (a)
10 it was not directed just at wages, and (b) he had options with
11 regard to the Bolton Judgment until at least March 22, 2006.
12 However, Costantino's failure to do so does not lessen the
13 wrongful nature of Respondent's behavior.

14 The State Bar argues that Respondent violated ER 1.9(a) by
15 representing Costantino in a lawsuit against the Boltons and
16 subsequently representing Celeris (a wholly owned collection LLC)
17 against Costantino for collections of a Judgment based on unpaid
18 fees (presumably including unpaid fees for obtaining the Bolton
19 Judgment) without Costantino's consent. While a lawyer could be
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22
23 ² The State Bar argues that, since the Costantino Judgment
24 was owned by Celeris, Respondent was representing Celeris in
25 trying to obtain satisfaction of the Costantino Judgment. In
26 fact, the distinction between Respondent and Celeris is
27 negligible. This Hearing Officer believes that Respondent could
have used information which he had obtained as attorney for
Costantino in order to obtain payment of the Costantino Judgment
even though it was owned by Celeris. That, however, is not what
happened here.

1 precluded from suing a current client for unpaid fees³ without the
2 client's consent, this Hearing Officer does not conclude that a
3 lawyer representing himself - or his collection agency - in an
4 effort to obtain payment of a judgment against a former client,
5 without the former client's consent, even if the collection effort
6 is focused on an asset which had been obtained by the former
7 client through representation by the lawyer, is per se a violation
8 of ER 1.9(a).

9 As Respondent argues, citing *Restatement (Third) of the Law*
10 *Governing Lawyers*, §§ 41 and 132, he had a right to use
11 information (particularly non-confidential information) he had
12 obtained during his representation of Costantino to effect payment
13 of his judgment against Costantino. Otherwise, a lawyer could be
14 precluded from obtaining satisfaction of fees owed by a former
15 client when the former client's only asset is one obtained through
16 the services of the attorney.

17 Respondent's misconduct herein more accurately fits within
18 the prohibition of ER 1.9(c). While not obtained during the
19 former representation, the critical information Respondent used
20 herein - that there were funds available to settle the Bolton
21 Judgment - was information he obtained from Rogers between
22

23 ³ See Arizona State Bar Comm. on Rules of Prof. Conduct,
24 Ethics Op. 00-03, (3/2000) relating to a lawyer suing a current
25 client for unpaid fees. That Opinion noted, in reference to
26 *Restatement (Third)* §209, that a violation of ER 1.7(a) against
27 suing one client on behalf of another client would be no
different if the suit was on the lawyer's own behalf. "The duty
of loyalty would be equally violated in both situations, if not
more egregiously where the lawyer is pursuing the lawyer's own
interest."

1 February 1 and February 15, 2007 under Rogers' false impression
2 that Respondent was representing the owner of that Judgment. That
3 information was then used by Respondent against the interest of
4 his former client without informing the former client of all the
5 information obtained from Rogers.

6 Respondent further argues that he had no duty to inform
7 Rogers, a non-client, that he did not represent Costantino or that
8 Costantino was seeking direct contact. This may have been true,
9 had he taken no action in response to Roger's inquiries. This
10 Hearing Officer concludes however that, having taken action to
11 further the negotiations with Rogers and having, albeit perhaps
12 negligently, told Rogers that Costantino was his client,
13 Respondent had an affirmative duty to inform Rogers that he did
14 not represent Costantino and that Costantino wanted direct
15 communication. As pointed out in ABA Ethics Opinion 06-439 (as
16 cited to this Hearing Officer by Respondent) at page 5: "False
17 Statements of material fact by lawyers in negotiation, as well as
18 implicit misrepresentations created by a lawyer's failure to make
19 truthful statements, have in some cases also led to professional
20 discipline."⁴

21 Respondent further argues that "Rogers should have been
22 aware of the correct relationship through Respondent's 29 March
23 and 10 April letters." *Respondent's Post-hearing Memorandum*, pg.
24 9 ln.4-5. However, by March 29th the damage was done. At that

25
26 ⁴ See cases cited in the American Bar Association, Standing
27 Committee on Ethics and Professional Responsibility, *Formal*
Opinion 06-439 April 12, 2006.

1 point Respondent had an ownership interest in the Bolton Judgment
2 and his relationship - or lack thereof - to Costantino was no
3 longer critical. The point at which Respondent had an obligation
4 to notify Rogers that he did not represent Costantino was at least
5 February 7, 2006 when he returned correspondence or - at the very
6 latest - February 8, 2006 when Costantino specifically requested
7 direct contact.

8 Respondent argues that "time, trouble, expense, inconvenience
9 and delay incurred in garnishing the *Bolton Judgment* ..."
10 demonstrate that he had no intent to deceive anyone in this
11 matter. *Respondent's Post-hearing Memorandum*, pg. 8 ln. 15-24.
12 To this Hearing Officer, Respondent's actions in initiating
13 garnishment rather than simply notifying Costantino that the
14 negotiating amount was up to \$25,000.00 - an amount that
15 Respondent would accept in full satisfaction of all Costantino's
16 obligations to him - are strong indications of Respondent's lack
17 of honesty in this matter.

18 **ABA STANDARDS**

19 **FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS - STANDARD 3.0**

20 ABA Standard 3.0 provides that four factors should be considered
21 in imposing the appropriate sanction: (1) the duty violated; (2) the
22 lawyer's mental state; (3) the actual or potential injury caused by
23 the lawyer's misconduct; and (4) the existence of aggravating or
24 mitigating factor in determining the appropriate sanction warranted
25 by Respondent's conduct.

26 In this matter, Respondent violated duties to his former client,
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1 to a non-client and to the legal profession. Although he believed
2 that his former client would achieve a benefit from partial
3 settlement of the Costantino Judgment, that benefit was secondary to
4 Respondent's primary purpose which was to achieve payment of that
5 Judgment on his own behalf. The actual injury to Costantino was that
6 he was precluded from utilizing the proceeds from the Bolton Judgment
7 as he saw fit. The potential injury included the possible ability to
8 negotiate a different - perhaps larger - settlement.

9 For a violation of ER 1.9, Standard 4.3 is reviewed to determine
10 the presumptive sanctions. As argued by the State Bar, application
11 of Standard 4.3 to this matter would put the presumption sanction
12 between suspension and reprimand because the Respondent's actions
13 were initially negligent but ultimately knowing and selfish. The
14 actual injury to Costantino is difficult to characterize because he
15 did receive a substantial benefit (complete satisfaction of his debt
16 to Respondent) and he did at one point indicate that he was willing to
17 exchange the Bolton Judgment for that benefit. On the other hand,
18 the choice was taken from his hands by Respondent's actions.
19 Ultimately, this Hearing Officer concludes that the injury was small.

20 **Standard 9.1 AGGRAVATING AND MITIGATING FACTORS**

21 This Hearing Officer finds three aggravating factors under
22 Standard 9.2 - (a) prior discipline; (b) selfish motive, and (i)
23 substantial experience in the practice of law.

24 This Hearing Officer finds four mitigating factors under
25 Standard 9.3 - (d) good faith effort to rectify the consequences of
26 his misconduct; (e) full and free disclosure to the disciplinary

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1 board and a cooperative attitude toward the proceedings; (g) good
2 character and reputation; (m) remoteness of prior offenses.

3 This Hearing Officer declines to find 9.22(g) as an aggravating
4 factor or 9.32(1) as a mitigating factor because Respondent's
5 continued denial of the wrongful nature of his actions appears to
6 this Hearing Officer to be a good faith belief that he did not act
7 inappropriately.

8 The mitigating factors equal in significance and out weigh in
9 number the aggravating factors.

10 PROPORTIONALITY

11 To have an effective system of professional sanctions, there
12 must be internal consistency and, to accomplish this, it is
13 appropriate to examine sanctions imposed in factually similar
14 matters. *Peasley, supra* 208 Ariz. at 33.

15 The State Bar cites, and this Hearing Officer accepts as
16 examples of somewhat similar matters in which a censure was applied
17 In re Owens, SB 94-0023-D (1995); In re Hayes SB 04-0092-D (2004)
18 and In re Kloberdanz, SB 01-0169-D (2001).

19 In addition, in *In re Copple* DC 03-2099 (2005) the attorney was
20 placed on one year probation with management supervision for signing
21 a legal document without first ascertaining whether he had the
22 authority to do so. There was one aggravating and four mitigating
23 factors.

24 In *In re Olcott*, SB-05-0149-D (2005) the attorney received
25 censure and six months probation for dealing dishonestly with another
26 attorney regarding a settlement check, failing to establish a probate

1 account for the settlement and failing to pay liens before disbursing
2 the funds to his law firm.

3 In *In re Doyle*, SB 06-0048-D (2006) the attorney received
4 a 90 day suspension and one year probation for dealing dishonestly
5 with the widow of a former client regarding a fee collection matter.
6 Respondent failed to inform the widow that a sheriff's sale had
7 produced sufficient funds to satisfy the debt; that she should
8 consult independent legal counsel; that he was personally interested
9 in the property; and that the person the property would be
10 transferred to was his client/wife. Respondent also failed to advise
11 that an overage may have resulted from the sheriff's sale. There
12 were two aggravating and two mitigating factors.

13 **RECOMMENDATIONS**

14 In making the following recommendations, this Hearing
15 Officer has considered the evidence presented at hearing, the
16 material cited in the State Bar's Notice of Intent to Use Prior
17 Discipline, all Memoranda of the parties and the American Bar
18 Association's *Standards for Imposing Lawyer Sanctions*. The
19 *Standards* provide guidance with respect to an appropriate sanction in
20 this matter, See e.g. *In re Peasley*, 208 Ariz. 27, 90 P.3d 764
21 (2004); *In re Rivkind*, 164 Ariz. 154; 791 P.2d 1037 (1990).

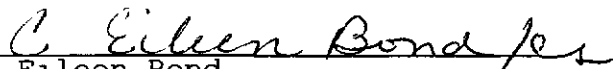
22 The Hearing Officer is mindful that the purpose of attorney
23 discipline is not to punish the lawyer but to protect the public and
24 deter future misconduct; to protect the public, the profession and
25 the administration of justice, and to instill public confidence in
26 the integrity of the profession. *ABA Standards; In re Fioramonti*,

1 176 Ariz. 182, 859 P.2d 1315 (1993); *In re Neville*, 147 Ariz. 106,
2 708 P.2d 1297 (1985); *Matter of Horwith*, 180 Ariz. 20, 881 P.2d 351
3 (1994).

4 The Hearing Officer recommends the following sanctions:

- 5 1. Respondent shall receive a censure, and
- 6 2. Respondent shall pay all costs and expenses incurred in the
7 disciplinary process.
- 8 3. Restitution is not applicable in this case.

9 FILED this 17th day of December, 2007.

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12 C. Eileen Bond
13 Hearing Officer 7N
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Original filed with the Disciplinary Clerk
this 17th day of December, 2007

Copy of the foregoing mailed
this 17th day of December, 2007, to

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by 